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No. 78-1513

In the Supreme Court of the United States

OCTOBER TERM, 1978

UNITED STATES OF AMERICA, APPELLANT

v.

PATRICIA ILENE CLARK, GUARDIAN FOR SHAWN D. CLARK AND TRICIA D. CLARK

ON APPEAL FROM THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinions of the Court of Claims (J.S. App. 1a-7a) are not reported.

JURISDICTION

The final judgment of the Court of Claims (J.S. App. 5a-7a) was entered on November 6, 1978. A notice of appeal was filed on December 5, 1978 (J.S. App. 8a). On January 29, 1979, the Chief Justice

extended the time for docketing the appeal to and including April 4, 1979, and the appeal was docketed on that date. On May 21, 1979, this Court postponed further consideration of its jurisdiction to the hearing of the case on the merits. The jurisdiction of this Court rests on 28 U.S.C. 1252. See pages 12-17, *infra*.

QUESTIONS PRESENTED

1. Whether this Court has jurisdiction over this appeal.

2. Whether sovereign immunity bars the award of retroactive monetary relief to persons denied benefits under a statute later held unconstitutional.

3. Whether 5 U.S.C. 8341(a)(3)(A), a part of the Civil Service Retirement Act, violates the Due Process Clause of the Fifth Amendment by permitting illegitimate children of a deceased federal employee to recover survivors' annuities only if they "lived with the employee * * * in a regular parent-child relationship."

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the Constitution provides in pertinent part:

> No person shall * * * be deprived of life, liberty, or property, without due process of law * * *.

2. 5 U.S.C. 8341 provides in pertinent part:

> (a) For the purpose of this section—
>
> * * * * *

> (3) "child" means—
>
> (A) an unmarried child under 18 years of age, including (i) an adopted child, and (ii) a stepchild or recognized natural child who lived with the employee or Member in a regular parent-child relationship * * *.
>
> * * * * *
>
> (e)(1) If an employee or Member dies * * * and is survived by a spouse, each surviving child is entitled to an annuity equal to the smallest of—
>
> (A) 60 percent of the average pay of the employee or Member divided by the number of children;
>
> (B) $900; or
>
> (C) $2,700 divided by the number of children.
>
> * * * * *
>
> If the employee or Member is not survived by a spouse, each surviving child is entitled to an annuity equal to the smallest of—
>
> (i) 75 percent of the average pay of the employee or Member divided by the number of children;
>
> (ii) $1,080; or
>
> (iii) $3,240 divided by the number of children.

3. 5 U.S.C. 8345 provides in pertinent part:

> (a) Each annuity is stated as an annual amount, one-twelfth of which, fixed at the nearest dollar, constitutes the monthly rate payable on the first business day of the month after the month or other period for which it has accrued.
>
> * * * * *

(f) * * *

(2) Notwithstanding any other provision of this subchapter, other than this subsection, the monthly rate of annuity payable under subsection (a) of this section to a surviving child shall not be less than the smallest primary insurance amount, including any cost-of-living increase added to that amount, authorized to be paid from time to time under title II of the Social Security Act, or three times such primary insurance amount divided by the number of surviving children entitled to an annuity, whichever is the lesser.

4. 28 U.S.C. 1252 provides in pertinent part:

Any party may appeal to the Supreme Court from an interlocutory or final judgment, decree or order of any court of the United States, * * * holding an Act of Congress unconstitutional in any civil action, suit, or proceeding to which the United States or any of its agencies, or any officer or employee thereof, as such officer or employee, is a party.

5. 28 U.S.C. 1491 provides in pertinent part:

The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort * * *. To provide an entire remedy and to complete the relief afforded by

the judgment, the court may, as an incident of and collateral to any such judgment, issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records, and such orders may be issued to any appropriate official of the United States. In any case within its jurisdiction, the court shall have the power to remand appropriate matters to any administrative or executive body or official with such direction as it may deem proper and just * * *.

STATEMENT

1. The Civil Service Retirement Act, 5 U.S.C. 8331 *et seq.*, provides benefits to specified federal civilian employees and Members of Congress. 5 U.S.C. 8331(1) and (2). These benefits include retirement, disability, and survivors' benefits (5 U.S.C. 8336-8341); in addition, a lump sum is paid to a surviving beneficiary designated by the employee if he leaves no survivors entitled to an annuity (5 U.S.C. 8342). Survivors' annuities are paid to the spouse and children of the deceased employee (5 U.S.C. 8341(b)(e)).[1] The statute provides that a "child" is an unmarried child under 18 years of age, "including" an adopted child and "a stepchild or

[1] The size of the child's annuity is equivalent to the lesser of the current minimum primary insurance amount payable under Social Security (see 42 U.S.C. 415(a)) or three times that amount divided by the number of entitled children. 5 U.S.C. 8345(f)(2). The lower ceilings provided by 5 U.S.C. 8341(e) have, in practical effect, been repealed by Section 8345(f)(2).

recognized natural child who lived with the employee or Member in a regular parent-child relationship" (5 U.S.C. 8341(a)(3)).[2]

The Civil Service Commission (now the Office of Personnel Management (OPM))[3] has interpreted this statutory provision as meaning that a recognized illegitimate child of a deceased employee is a statutory "child" only if he was sharing a common roof with the employee at the time of his death in circumstances that indicate a regular parent-child relationship, or that any interruption in this common domicile at the time of death was expected to be temporary. (A. 6-7). Federal Personnel Manual Supp. 831-1, subchapter S17-2(e). See also *Proctor* v. *United States*, 448 F. Supp. 418, 421-422, 426 (D.D.C. 1977).

2. George G. Isaacson, a covered federal employee, died in an automobile accident in August 1974. He was unmarried, and he had designated his father as the beneficiary entitled to the lump-sum payment of his benefits. In September 1974 Patricia Clark applied for children's benefits for Shawn and Tricia Clark, Isaacson's illegitimate children. Their paternity was established by a state court decree dated June 2, 1972, ordering Isaacson to contribute to appellees' support (Motion to Affirm App. 1a-4a). The Civil Service Commission's Bureau of Retirement Insurance and Occupational Health (BRIOH) denied the application for children's benefits because Shawn and Tricia were not living with Isaacson in a parent-child relationship at the time of his death (A. 4).[4] The Commission's Board of Appeals and Review affirmed this decision, finding that "decedent did not live in a parent-child relationship with the Clark children from at least 1972 until the date of his death in 1974" (A. 7). The Board noted the contention that the statutory lived-with requirement is unconstitutional, but it held that it is not empowered to consider such arguments (A. 9).[5]

Appellees sought review of the decision in the Court of Claims, invoking its jurisdiction under 28 U.S.C. 1491. They maintained that 5 U.S.C. 8341, as applied to deny benefits to illegitimate children because they were not living with the decedent at the time of his death, violated the equal protection component of the Due Process Clause of the Fifth Amendment (A. 18).[6] In response to appellees' motion for summary

[2] A person incapable of self-support by reason of a mental or physical disability, or a student under 22, also may be a "child" (5 U.S.C. 8341(a)(3)).

[3] As a result of the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111, and Reorganization Plan No. 2 of 1978, 43 Fed. Reg. 36037, the Civil Service Commission was abolished effective January 1, 1979, and its functions were divided among several agencies. The Office of Personnel Management assumed primary responsibility for the retirement program for civil servants.

[4] A lump-sum payment accordingly was made to Isaacson's father, his designated beneficiary (A. 4).

[5] The Board also rejected the contention that the state court support order legitimated Shawn and Tricia by operation of Montana state law (A. 7-9). Appellees have not pressed that contention here (Motion to Affirm 5-6, 18-19).

[6] Shawn and Tricia also contended that Isaacson had lived with them "from and after the children's respective births"

judgment the government conceded that *Gentry* v. *United States*, 546 F.2d 343 (Ct. Cl. 1976), controlled in that court the question whether the lived-with requirement of Section 8341 is constitutional.[7] It accordingly suggested that the case be remanded so that the agency could consider whether Shawn and Tricia were entitled to benefits under the holding of *Gentry* (A. 23-24).[8]

The Court of Claims granted summary judgment against the government, relying on its decision in *Gentry*. It concluded that there was no need for a remand to the agency; it stated that there was "no dispute over the facts of parentage, recognition, and support * * * [because] a prior, valid, judgment is conclusive on these points" (J.S. App. 3a),[9] and it

(A. 12), had openly acknowledged them, and had complied with the state court's support order consistently until his death (A. 17).

[7] This response stated that the concession "is in no way to be construed as a waiver of [the government's] right to seek a writ of certiorari" in this case (A. 23-24).

[8] The United States also filed a contingent third party claim against George Isaacson, decedent's father and designated beneficiary, seeking the return of the lump-sum payment made to him.

[9] The Court of Claims' assertion is not supported by the record. The Montana judgment is not "conclusive" on the United States, which was not a party. And it does not show that Isaacson in fact supported Shawn and Tricia. They maintain that Isaacson contributed to their support in compliance with the state court order (see, *e.g.*, A. 13, 17; Motion to Affirm 7, 18, 19), but neither the BRIOH nor the Appeals Board considered whether their contentions are correct. No agency has determined that Isaacson was paying the required support, and the Court of Claims' record is barren on that matter.

remanded the case to the trial division for determination of the amount to be awarded (J.S. App. 3a-4a).

The parties stipulated, "for the purpose of enabling the Court to render a final judgment" (A. 28), that the amount due each child on June 30, 1978, was $7,081.33, and that they are entitled to be placed on the annuity rolls for continued payments from that date. The Court of Claims entered its final judgment on November 6, 1978, requiring the Commission to pay the stipulated amounts and to place Shawn and Tricia on its annuity rolls effective June 30, 1978 (J.S. App. 5a-7a).[10]

SUMMARY OF ARGUMENT

I

This Court may consider the questions presented, despite the government's decision not to appeal from the interlocutory decision determining liability, in accordance with the general rule that an appellate court has jurisdiction to consider the entire case on appeal from a final judgment. The fact that 28 U.S.C. 1252 *permits* the government to appeal from interlocutory orders of the Court of Claims does not

[10] Shawn and Tricia Clark accordingly have been receiving annuities since June 30, 1978; each child currently receives $187 a month.

The court also granted the government's cross claim against decedent's father and entered judgment in favor of the United States for $7,755.12, the lump sum previously paid to him (J.S. App. 7a). Isaacson's father has not sought review of this judgment.

mean that it *must* do so, and the strong policy reasons for discouraging piecemeal review support this Court's consistent refusal to read any such requirement into similar statutes permitting interlocutory review. Moreover, the order below was one "holding an Act of Congress unconstitutional" from which a direct appeal to this Court lies under 28 U.S.C. 1252. The decision, requiring the payment of benefits to Shawn and Tricia Clark, was necessarily based on the holding that the statutory condition of entitlement, which they could not meet, was unconstitutional. It is not jurisdictionally significant that the court also reached that decision in an earlier case. Nothing in 28 U.S.C. 1252 limits a direct appeal to the *first* decision of a court holding a particular statutory provision unconstitutional.

II

The Court of Claims has jurisdiction over claims against the United States founded on statutes or the Constitution; it may enter judgments for money due and provide appropriate ancillary relief. Because Shawn and Tricia Clark had no statutory or constitutional claim for money due, the court had no ancillary jurisdiction to require the prospective payment of benefits to them. The children's annuity provision of the Civil Service Retirement Act gave them no statutory claim: indeed, the very reason the Court of Claims held the provision unconstitutional was because it foreclosed their claims. No right to retroactive benefits is accorded by any other provision of

the Civil Service Retirement Act or by the Tucker Act. And the Constitution does not require or authorize an award of money damages to remedy an unconstitutional denial of benefits. In the absence of any express authorization for such payments, the doctrine of sovereign immunity forbids the award of money in cases such as this. The Court of Claims therefore should have dismissed the case for want of jurisdiction even if the statute is unconstitutional.

III

The Court of Claims' decision on the merits also is incorrect. The requirement that illegitimate children must show that they were living with the wage-earner when he died in order to qualify for survivors' benefits bears an evident and substantial relationship to appropriate statutory goals. This Court's decisions involving classifications based on illegitimacy require no more. The Civil Service Act is a typical social insurance system designed to replace support lost by a wage-earner's dependents when he dies or retires; the classes of dependents most likely to have lost support are defined by categorical rules, rather than case-by-case adjudications of actual dependence. The lived-with requirement for illegitimates is a reasonable categorical rule: those illegitimate children who can meet that requirement are substantially more likely as a class to have lost support than the illegitimate children who cannot. The statutory classification is accordingly constitutional under the rationale of *Jimenez* v. *Weinberger*, 417 U.S. 628 (1974), and *Mathews* v. *Lucas*, 427 U.S. 495 (1976).

In addition, the lived-with requirement serves a reasonable statutory purpose by minimizing the difficulty of establishing the paternity of illegitimate children. The children who were living with the wage-earner when he died will almost always be readily identifiable; in contrast, an assertion that an illegitimate was recognized by the decedent at some time, and even received support from him, is more difficult to evaluate and more likely to be raised after the survivors entitled to an annuity have been initially determined. Thus, the lived-with requirement facilitates the prompt and accurate determination of entitlement to benefits.

ARGUMENT

I

THIS COURT HAS JURISDICTION OVER THIS APPEAL

Appellees contend that this Court lacks jurisdiction over this appeal. The Court postponed consideration of this question to the hearing of the case on the merits. The argument against jurisdiction has two prongs: (1) that the government failed to take a timely appeal from the Court of Claims' order of January 27, 1978, and thus lost its right to seek review of the merits, retaining only a right to contest the computation of liability; and (2) that neither the January 27 order nor the final judgment of November 6 is an order "holding an Act of Con-

gress unconstitutional" (28 U.S. 1252). Appellees are wrong on both counts.

A. There Is No Need To Seek Immediate Review Of Interlocutory Decisions Concerning Liability

The notice of appeal was filed on December 5, 1978 (J.S. App. 8a), 29 days after the Court of Claims entered its final judgment in this case (J.S. App. 7a). The appeal accordingly is timely under 28 U.S.C. 2101(a).[11] Appellees contend however, that this appeal is untimely because the government did not appeal from the order of January 27, 1978, which decided the liability issue.

The January 27 order unquestionably is interlocutory. An order that decides matters of liability but reserves questions of relief *cannot* be appealed from a district court to a court of appeals. The strong policy against piecemeal appellate review requires the aggrieved party to wait until damages have been computed before filing his appeal. *Liberty Mutual Ins. Co.* v. *Wetzel*, 424 U.S. 737 (1976). The principles are much the same, we submit, when the appeal lies to this Court rather than to a court of appeals: liability issues can be addressed on appeal once relief has been entered.

It is true that 28 U.S.C. 1252, on which this appeal is based, allows review of both interlocutory and final orders declaring statutes unconstitutional. The

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[11] The appeal was docketed on April 4, 1979, within the extension of time granted by the Chief Justice. Appellees do not maintain that the docketing of the appeal was untimely.

provision for review of interlocutory orders reflects Congress' concern that the United States be able to obtain review at the earliest possible moment of orders striking down statutes. See *McLucas* v. *DeChamplain*, 421 U.S. 21, 31 (1975). But it does not follow, from the fact that the statute permits appeals of interlocutory orders, that it also requires immediate appeals on pain of forfeiture of all right to obtain review in this Court.[12] That would undermine the purpose of Section 1252: to permit full and effective review in this Court of decisions invalidating federal statutes. If the United States chooses to wait for a final judgment before filing an appeal—if it chooses, in other words, to act in the way that private litigants *must* act in ordinary civil litigation—that is not a good reason for holding that it has lost ability to obtain a decision on the merits.[13]

[12] Appellees misinterpret *McLucas* as construing Section 1252 "to authorize and require" immediate review of interlocutory orders (Motion to Affirm 11). Instead, in explaining why this Court's jurisdiction under Section 1252 is not subject to the limitations on direct appeals to this Court under 28 U.S.C. (1970 ed.) 1253, the Court emphasized the broad scope of review available under 1252 (421 U.S. at 31). See also R. Stern & E. Gressman, *Supreme Court Practice* § 2.10 (5th ed. 1978).

[13] The same is true for other statutes allowing interlocutory appeals. 28 U.S.C. 1292(a) allows apeals from interlocutory orders entering, dissolving, or modifying preliminary injunctions. Under appellees' argument, any person who failed to appeal from the entry of a preliminary injunction would be barred from challenging the entry of a permanent injunction that rested on the same legal grounds. But that has never been the law. See *Victor Talking Machine Co.* v. *George*, 105 F.2d 697 (3d Cir.), cert. denied, 308 U.S. 611 (1939) (collecting cases); cf. *Hamilton-Brown Shoe Co.* v. *Wolf Bros. Co.*, 240 U.S. 251, 257-259 (1916) (decision of Court rests on grounds rejected by court of appeals in decision on interlocutory appeal, from which certiorari was denied). It would do nothing but produce useless legal work to require parties to appeal from preliminary injunctions when they are content to wait for a final order.

The rule that review of a final judgment entails review of any interlocutory decisions on liability also prevails under 28 U.S.C. 1255, which gives this Court certiorari jurisdiction over both interlocutory and final judgments of the Court of Claims. On petitions for certiorari filed after the final judgment determining damages, this Court is free to consider the validity of a previous order determining liability. *United States* v. *Carlo Bianchi & Co.*, 373 U.S. 709, 712 (1963);[14] *Marconi Wireless Co.* v. *United States*, 320 U.S. 1, 47 (1943). Cf. *American Foreign S.S. Co.* v. *Matise*, 423 U.S. 150 (1975) (jurisdiction based on 28 U.S.C. 1254); *Toledo Scale Co.* v. *Computing Scale Co.*, 261 U.S. 399, 418 (1923) (same); R. Stern & E. Gressman, *Supreme Court Practice* § 2.2 (5th ed. 1978) (collecting cases).[15]

[14] Although the Court in *Bianchi* considered the issues decided by the interlocutory order on the government's petition from the final order, it did not discuss its jurisdiction to do so. The jurisdiction issue was, however, specifically raised in that case. Respondents challenged the timeliness of the government's petition on grounds similar to those raised by appellees here; the government responded to those objections in its response to the brief in opposition (No. 529, October Term, 1962).

[15] The cases cited by appellees in support of their contention that this Court lacks jurisdiction because the govern-

B. The Court Of Claims Held An Act Of Congress Unconstitutional

28 U.S.C. 1252 authorizes an appeal from "an * * * order of [a] court of the United States * * * holding an Act of Congress unconstitutional in [a] civil action * * * to which the United States * * * is a party." The Court of Claims held an Act of Congress unconstitutional, and thus this Court has jurisdiction under 28 U.S.C. 1252. The Court of Claims recognized that Shawn and Tricia Clark do not meet the statutory requirements for benefits. It nevertheless required that benefits be paid, because, it held, the rule that prevented the payment is unconstitutional (J.S. App. 2a-3a). The court's conclusion that part of 5 U.S.C. 8341 is unconstitutional is the basis for its order directing payment of benefits. Section 1252 is "properly invoked when the court below has made [a] determination of unconstitutionality [that] * * * forms the necessary predicate to the grant or denial of * * * relief." *McLucas* v. *DeChamplain*, *supra*, 421 U.S. at 30; *United States* v. *Raines*, 362 U.S. 17, 20 (1960).

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ment did not appeal from the order determining liability (Motion to Affirm 11) apparently all involve failures to seek timely review of final orders. It is impossible to determine from the Court's per curiam opinions in *Glasgow Navigation Co.* v. *Munson S.S. Line*, 246 U.S. 647 (1918), and *Collard* v. *Pittsburgh, C. C. & St. L. Ry.*, 246 U.S. 653 (1918), in what way the Court's jurisdictional requirements had not been satisfied. Similarly, *Parish* v. *Maryland & Virginia Milk Producers Ass'n*, cert. denied, No. 78-1246 (Mar. 19, 1979), was simply an unexplained denial of certiorari.

Appellees argue, however, that *Gentry* v. *United States*, 546 F.2d 343 (Ct. Cl. 1976), reh'g denied, 551 F.2d 852 (1977), rather than the instant case, held the statute to be unconstitutional. But nothing in Section 1252 indicates that this Court's jurisdiction is affected by the fact that a lower court relies on an earlier decision in instructing the Executive Branch to disregard a statute.[16] Appellees' contention that an appeal under Section 1252 lies only from the *first* decision of any court holding a particular statute unconstitutional is inconsistent with the plain language of Section 1252, which permits an appeal from an order of any court, not just the first court or the first decision of a particular court. See *International Ladies' Garment Workers Union* v. *Donnelly Garment Co.*, 304 U.S. 243, 249 (1938). Appellees cite no precedent for their narrow reading of Section 1252, and we are aware of none.

II

THE COURT OF CLAIMS LACKED JURISDICTION OVER THIS CASE BECAUSE SOVEREIGN IMMMUNITY BARS ANY AWARD OF MONEY DAMAGES

The Court of Claims has jurisdiction of "any claim against the United States founded either upon the Constitution, or any Act of Congress * * *." 28

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[16] Similarly, this Court's jurisdiction would not be affected if the lower court said that the unconstitutionality of the statute was an inevitable consequence of a decision of this Court. Indeed, *jurisdiction* would be present even if the appeal concerned a statute that this Court explicitly had held unconstitutional in some earlier case.

U.S.C. 1491. "[T]he only judgments which the Court of Claims [is] authorized to render against the government * * * are judgments for money found due from the government to the petitioner." *United States* v. *King*, 395 U.S. 1, 3 (1969), quoting *United States* v. *Alire*, 73 U.S. (6 Wall.) 573, 575 (1867). Although the Court of Claims may "remand appropriate matters to any administrative * * * official with such direction as it may deem proper and just," its power to do so is limited to "any case within its jurisdiction" (28 U.S.C. 1491) and thus can be invoked only if the case is one in which an award of money is proper. *United States* v. *Testan*, 424 U.S. 392, 404 (1976).[17] Accordingly, unless the court had jurisdiction in this case to award a judgment for money, it had no jurisdiction to require the Commission to place Shawn and Tricia Clark on the annuity roles.

The Court of Claims had no jurisdiction for two reasons. First, there was no money due under the Civil Service Retirement statute. To the contrary, it was precisely because the statute does *not* allow the payment that the court declared it to be unconstitutional. Second, the Constitution itself neither requires nor authorizes an award of money damages as a remedy for any unconstitutionality there may be in the statute. To the contrary, the doctrine of

[17] The ancillary relief provision, added in 1972 (Pub. L. No. 92-415, Section 1, 86 Stat. 652), is not authority for ordering equitable relief incident to an improper award of money damages. See S. Rep. No. 92-1066, 92d Cong., 2d Sess. 1-3 (1972); H.R. Rep. No. 92-1023, 92d Cong., 2d Sess. 2-3 (1972).

sovereign immunity forbids the award of money in cases such as this and restricts a court to the award of prospective injunctive relief—precisely the kind of relief that the Court of Claims is not authorized to grant. Consequently, even if the lived-with rule of 5 U.S.C. 8341(a)(3) is unconstitutional, the Court of Claims was without jurisdiction.[18] It should have dismissed the suit or transferred it to a district court under 28 U.S.C. 1506.

The United States is immune from a judicial order to pay money as an accrued liability unless Congress has unequivocally authorized such relief. *United States* v. *Testan*, *supra*, 424 U.S. at 399; *United States* v. *King*, *supra*, 395 U.S. at 4. There is no such authorization here. By limiting the payment of annuities to illegitimate children who lived with the decedent, Congress expressly prohibited payment to children such as Shawn and Tricia Clark, who cannot satisfy that requirement. See *United States* v. *MacCollom*, 426 U.S. 317, 321-323 (1976). If a court

[18] Appellees assert (Motion to Affirm 16) that the government waived its right to question the Court of Claims' jurisdiction by failing to raise the question below. But, as this Court noted in *Philbrook* v. *Glodgett*, 421 U.S. 707, 721 (1975), "we have repeatedly held that we must take note of want of jurisdiction in the [court below] even though neither party has raised the point." Moreover, the Court of Claims' jurisdiction "depends wholly upon the extent to which the United States has waived its sovereign immunity to suit" (*United States* v. *King*, *supra*, 395 U.S. at 4), and that waiver can be made only by Congress, not by a failure to raise it in litigation. *United States* v. *United States Fidelity & Guaranty Co.*, 309 U.S. 506, 513 (1940) (collecting cases); cf. *Nevada* v. *Hall*, No. 77-1337 (Mar. 5, 1979), slip op. 4-6.

holds the lived-with requirement unconstitutional, that removes the prohibition, but it does not create a *statutory* authorization for payments. Cf. *United States* v. *McDougall's Administrator*, 121 U.S. 89, 98 (1887). The authorization for such an award would have to be found in some statute other than the one that prohibited the payment.[19]

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[19] Appellees may argue that a statutory authorization is unnecessary because the relief granted to them here is part of the "prospective" application of the decision in *Gentry*. That argument would be unpersuasive for several reasons.

First, the application of *Gentry* to this case is not "prospective" so far as appellees are concerned. The Court of Claims did not enter a declaratory judgment or injunction in *Gentry*, and it had no authorization to do so. Appellees were not parties in *Gentry*. Appellees seek an award of money as an accrued liability. Although the holding on the merits in *Gentry* (if correct) would supply a good reason to grant appellees the relief they seek, it does not create statutory authority to do so.

Second, appellees do not challenge any decision of an agency that took place after *Gentry* was decided. The request for benefits was denied in 1974; *Gentry* did not become final until 1977. The denial of benefits thus did not violate any rights appellees may have acquired derivatively through the prospective application of *Gentry*. For this reason, an award of benefits as an accrued liability also cannot be justified as part of the enforcement of other judicial orders declaring the lived-with requirement unconstitutional. The injunction entered against the lived-with rule on November 30, 1977, in *Proctor* v. *United States*, 448 F. Supp. 418 (D.D.C.), does not apply to appellees because the case was not a class action. And the judgment in a class action declaring the requirement unconstitutional, *Jenkins* v. *United States Civil Service Comm'n*, 460 F. Supp. 611 (D.D.C. 1978), is on appeal. The petition in this case was filed in the Court of Claims 18 months before *Jenkins* was decided. Under the well-pleaded complaint rule, the jurisdiction of a court must be determined by the

The Tucker Act does not supply the necessary legislative authorization. As this Court explained in *Testan*, the Tucker Act "does not create any substantive right enforceable against the United States for money damages" (424 U.S. at 398). Finding a remedy in the Tucker Act would be especially inappropriate when the government has withheld benefits in accordance with a statute.[20]

The general provisions of the Civil Service Retirement Act also do not supply the necessary authority. That Act contains no provision stating that, if a

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allegations and theories of the complaint, not by subsequent events. *Costello* v. *Wainwright*, 430 U.S. 325 (1977); *Oneida Indian Nation* v. *County of Oneida*, 414 U.S. 661 (1974).

[20] The Court of Claims concluded in *Gentry* that its jurisdiction was confirmed by *United States* v. *Lovett*, 328 U.S. 303 (1946), which affirmed a judgment of the Court of Claims awarding back pay to several federal employees despite an appropriation statute prohibiting payment of salaries to them. The court in *Gentry* concluded that there was an authorization to award money in *Lovett* and in *Gentry* because a court could "read the relevant statute and award whatever payment it grants, omitting from our interpretation of its effect any constitutionally void provision contained in it" (546 F.2d at 346). But in *Lovett* the employees had actually performed the work for which they sought payment—their claim of entitlement was based on that work and on the authorization statute allowing agencies to hire employees; it was not based on the appropriation statute. The appropriation statute was relevant only as a bar to payments to which the petitioners otherwise would have been entitled. Here, in contrast, appellees have no claim against the government that is not based on the challenged statute. Cf. *South Puerto Rico Sugar Co. Trading Corp.* v. *United States*, 334 F.2d 622, 626 (Ct. Cl. 1964).

portion of the statute forbidding payment is declared invalid, then the payments sought are authorized and retroactive payments are allowed. Instead, it provides only that "no benefit based on [the service of a deceased employee or Member] shall be paid * * * unless an application therefor is received in the Civil Service Commission within 30 years after the death or other event which gives rise to title to the benefit." 5 U.S.C. 8345(h)(2). It authorizes, in other words, the belated payment of benefits provided for by law. But it does not authorize the payment of money contrary to law.

This Court has stated repeatedly that waivers of sovereign immunity "cannot be implied but must be unequivocally expressed." *United States* v. *King*, *supra*, 395 U.S. at 4; *United States* v. *Testan*, *supra*, 424 U.S. at 399; *United States* v. *Sherwood*, 312 U.S. 584, 586 (1941); *Soriano* v. *United States*, 352 U.S. 270, 276 (1957). In light of this general principle, the Civil Service Retirement Act should not be construed to authorize retroactive payments to persons to whom the statute explicitly denies benefits. Congress simply has not provided for retroactive payments where claimants cannot establish statutory eligibility for such payments. Cf. *Edelman* v. *Jordan*, 415 U.S. 651 (1974) (distinguishing between the award of an accrued monetary liability for past wrongs and prospective relief with monetary consequences); *Milliken* v. *Bradley*, 433 U.S. 267, 288-290 (1977) (same).

To be sure, this Court, without mentioning the sovereign immunity problem, has occasionally approved the payment of benefits as an accrued liability in the course of affirming decisions that had invalidated Social Security provisions on constitutional grounds. See, *e.g.*, *Califano* v. *Goldfarb*, 430 U.S. 199 (1977), aff'g 396 F. Supp. 308 (E.D.N.Y. 1975); *Weinberger* v. *Wiesenfeld*, 420 U.S. 636 (1975), aff'g 367 F. Supp. 981 (D.N.J. 1973). But because the problem was not briefed, and the cases do not discuss it, they do not preclude the Court from now holding that retroactive relief is impermissible.[21] In recognizing the states' Eleventh Amendment immunity from retroactive monetary relief in *Edelman* v. *Jordan*, *supra*, the Court departed from four previous cases (including one decided after plenary consideration) that had approved such relief without explicitly considering the Eleventh Amendment problem (415 U.S. at 670-671).

The lack of jurisdiction in the Court of Claims does not mean that appellees have no remedy. They may seek an injunction in a district court to require OPM to put them on the annuity rolls. Congress has waived sovereign immunity in suits seeking injunc-

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[21] See also *Stone* v. *Powell*, 428 U.S. 465, 480-81 & nn.14, 15 (1976); *Hagans* v. *Lavine*, 415 U.S. 528, 533 n.5 (1974); *United States* v. *Tucker Truck Lines, Inc.*, 344 U.S. 33, 37-38 (1952); *Webster* v. *Fall*, 266 U.S. 507, 511 (1925) ("Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents").

tions. 5 U.S.C. 702. Indeed, appellees may already be members of the nationwide plaintiff class in *Jenkins* v. *United States Civil Service Comm'n*, 460 F. Supp. 611 (D.D.C. 1978), appeal pending, No. 79-1199 (D.C. Cir.), in which the district court held the lived-with requirement unconstitutional and ordered OPM to discontinue using it to deny annuities to class members. Although the government is appealing that decision, appellees may be entitled, as class members, to whatever equitable relief finally is ordered in *Jenkins*.

III

THE CONSTITUTION DOES NOT PROHIBIT CONGRESS' DECISION THAT ILLEGITIMATE CHILDREN MUST SHOW THAT THEY WERE LIVING WITH THE WAGE EARNER WHEN HE DIED IN ORDER TO QUALIFY FOR SURVIVORS' BENEFITS

If the Court disagrees with our submission that the Court of Claims lacked jurisdiction to pass on the constitutionality of the statute, then it will be required to consider the merits of this case.[22] We argue below that the lived-with requirement is constitutional because it bears an evident and substantial relationship to the goal of readily identifying the

[22] Several other federal courts, like the Court of Claims, have concluded that the lived-with requirement is unconstitutional. *Myers* v. *Commissioners of Civil Service Comm'n*, Civ. No. 8682 (S.D. Ohio Aug. 8, 1977); *Proctor* v. *United States*, 448 F. Supp. 418 (D.D.C. 1977); *Tenny* v. *United States*, 441 F. Supp. 224 (E.D. Mo. 1977); *Jenkins* v. *United States Civil Service Comm'n*, 460 F. Supp. 811 (D.D.C. 1978), appeal pending, No. 79-1199 (D.C. Cir.).

illegitimate children most likely to have been dependent on the wage-earner.

A. Classifications Based On Illegitimacy Are Not Subject To Strict Scrutiny

Several of this Court's recent decisions suggest that in evaluating statutory classifications based on illegitimacy, a somewhat closer scrutiny than that traditionally applied to laws regulating economic and social conditions may be appropriate. See, *e.g.*, *Trimble* v. *Gordon*, 430 U.S. 762, 767 (1977); *Parham* v. *Hughes*, No. 78-3 (Apr. 24, 1979) (plurality opinion). But see *Mathews* v. *Lucas*, 427 U.S. 495, 505 (1976).[23] This Court has nevertheless declined all invitations to subject such classifications to the

[23] The Court in *Lucas* refused to treat illegitimacy as a constitutionally suspect classification meriting the strict scrutiny applied to classifications based on race or national origin, stating (427 U.S. at 505) that "we have had no difficulty in finding the discrimination [against illegitimates] impermissible on less demanding standards than those advocated here." Although that language is consistent with the application of an intermediate test for classifications involving illegitimacy, the Court in *Mathews* v. *DeCastro*, 429 U.S. 181, 185 (1976)—a case involving a neutral classification—referred to *Lucas* as demonstrating "the standard by which legislation such as this must be judged" (429 U.S. at 185). This plurality opinion in *Lalli* v. *Lalli*, No. 77-1115 (Dec. 11, 1978), later cited *Lucas* as applying an intermediate standard to classifications involving illegitimacy (slip op. 5). Cf. *Parham* v. *Hughes*, *supra*, plurality slip op. 4-6. The cases thus continue to support Mr. Justice Rehnquist's observation in dissent in *Trimble*, *supra*, 430 U.S. at 781, that "the unanswered question remains as to the precise sort of scrutiny to which classifications based on illegitimacy will be subject."

"strict" scrutiny required when "suspect" classifications are involved. See, *e.g.*, *Mathews* v. *Lucas*, *supra*, 427 U.S. at 505; *Trimble* v. *Gordon*, *supra*, 430 U.S. at 766-767; *Lalli* v. *Lalli*, No. 77-1115 (Dec. 11, 1978), plurality slip op. 5. Classifications based on illegitimacy thus sometimes may be justified by the practical need of legislators to make classifications that deal with broad groups of persons and omit case-by-case decisionmaking. *Lalli* v. *Lalli*, *supra*, plurality slip op. 13. Cf. *Vance* v. *Bradley*, No. 77-1254 (Feb. 22, 1979), slip op. 14-15. As the Court explained in *Mathews* v. *Lucas*, *supra*, 427 U.S. at 509-510 (citations omitted):

> In cases of strictest scrutiny, such approximations must be supported at least by a showing that the Government's dollar "lost" to overincluded benefit recipients is returned by a dollar "saved" in administrative expense avoided. Under the standard of review appropriate here, however, the materiality of the relation between the statutory classifications and the likelihood of dependency they assertedly reflect need not be "scientifically substantiated." Nor, in any case, do we believe that Congress is required in this realm of less than strictest scrutiny to weigh the burdens of administrative inquiry solely in terms of dollars ultimately "spent," ignoring the relative amounts devoted to administrative rather than welfare uses. Finally, while the scrutiny by which their showing is to be judged is not a toothless one, the burden remains upon the [affected parties] to demonstrate the insubstantiality of that relation.

In sum, in cases involving statutory classifications based on illegitimacy, the Court "does not focus on the abstract 'fairness' of [the challenged] law, but on whether the statute's relation to the [governmental] interests it is intended to promote is so tenuous that it lacks the rationality contemplated by the [Fifth] Amendment." *Lalli* v. *Lalli*, *supra*, plurality slip op. 13. The question is simply whether the statutory provisions concerning illegitimate children "bear an evident and substantial relation to the particular [federal] interests this statute is designed to serve." *Id.* at 8. In light of *Lucas* and *Lalli*, the particular classification at issue here meets this test.

B. The Classification Is Substantially Related To Important Statutory Goals

1. *The Civil Service annuities for survivors are designed to replace support that may have been lost by the wage-earner's death*

The Civil Service Retirement Act, like the Social Security Act, is designed to replace support lost by the wage-earner's dependents when he dies.[24] The rule that benefits will be paid to the illegitimate children of a wage-earner only if they lived with him at his death furthers this statutory purpose by providing a ready method of identifying those illegitimate children most likely to have lost support.

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[24] See, *e.g.*, *Califano* v. *Boles*, No. 78-808 (June 27, 1979), slip op. 1, 7; *Jimenez* v. *Weinberger*, 417 U.S. 628, 634 (1974); *Mathews* v. *DeCastro*, 429 U.S. 181 (1976); *Califano* v. *Jobst*, 434 U.S. 47 (1977).

The surviving child's annuity was first enacted in 1948 (Act of February 28, 1948, ch. 84, Section 11, 62 Stat. 55). It was payable to "an unmarried child, including a dependent stepchild or an adopted child, under the age of eighteen years, or such unmarried child, who because of physical or mental disability is incapable of self-support." Children's benefits thus were paid only to those children most likely to have been dependent on the wage-earner because of their age or disability and their marital status. Moreover, the amount of the annuity depended on whether another parent survived, on the apparent theory that a surviving parent would provide supplementary support.[25]

Congress' attention to the problem of replacing lost support was evident in 1956, when it amended the survivorship provisions after *Visor* v. *United States*, Civ. No. 9922(2) (E.D. Mo. Feb. 12, 1955) interpreted the Act as providing benefits to illegitimate, as well as legitimate, children. The 1956 amendments elaborated on the earlier definition of an entitled child to include "(1) an adopted child and (2) a stepchild or recognized natural child who received more than one-half his support from and lived with the * * * employee in a regular parent-child relationship" 5 U.S.C. (1958 ed.) 2251(j). Instead of treating all illegitimate children as presumptively dependent on the employee, Congress required a specific showing of dependence for illegitimate children, as it previously had for stepchildren. In addition,

[25] 5 U.S.C. 8341(e). See note 1, *supra*.

legitimate children with a surviving parent were required, as a condition of entitlement, to show that they had received more than half their support from the deceased civil servant (5 U.S.C. (1958 ed.) 2260(d)). See also H.R. Rep. No. 2854, 84th Cong. 2d Sess. 17-18 (1956).

As it often has done when dealing with programs that replace lost support,[26] Congress eventually amended the statute to include more categorical rules, replacing case-by-case determinations of dependence with categories of eligibility that are likely (but not certain) to reflect dependence. The Civil Service Retirement Act was amended in this way in 1966. Pub. L. No. 89-554, 80 Stat. 577, 5 U.S.C. (1970 ed.) 8341(a)(3). The Court of Claims saw in this amendment a disavowal of the original principle that benefits are intended to replace lost support and the creation of a principle that all children are entitled to benefits. *Gentry* v. *United States*, *supra*, 546 F.2d at 343, 551 F.2d at 854-855. It was quite irrational, the court thought, to deny to illegitimates the advantages created by this new principle for the distribution of benefits. But the court erred in finding such a new approach in the 1966 revisions. Cf. *Califano* v. *Boles*, No. 78-808 (June 27, 1979), slip op. 7-12 (a similar reformation of another program did not amount to abandoning emphasis on replacing lost support).

[26] See, *e.g.*, *Califano* v. *Boles*, No. 78-808 (June 27, 1979), slip op. 9-12; *Califano* v. *Jobst*, *supra*, 434 U.S. at 57 n.16; *Mathews* v. *Lucas*, *supra*, 427 U.S. at 507-509.

The process of amendments began with a message from the President to Congress, transmitting the Joint Annual Report of the Director of the Bureau of the Budget and the Chairman of the Civil Service Commission and the Report of the Cabinet Committee on Federal Staff Retirement Systems H.R. Doc. No. 402, 89th Cong., 2d Sess. (1966); see *The Federal Salary and Fringe Benefits Act of 1966: Hearings on H.R. 14122 Before the Senate Comm. on Post Office and Civil Service*, 89th Cong., 2d Sess. 7 (1966). The Cabinet Committee report explains that the half-support requirement had the practical effect of denying benefits to the surviving children of most female civil servants, who typically earned less than their husbands, and thus contributed less than half of the support of their children. It therefore recommended a change, which later was enacted, precisely because "[r]etirement systems are intended to cushion the effects of loss of income through death * * *. [T]he preponderance of working wives * * * work because the family needs the money, especially for the children. * * * In short, the income of working mothers is significant for support of children, but is inadequate to meet the children's dependency requirement when the mother dies." H.R. Doc. No. 402, 89th Cong., 2d Sess. App. 41 (1966). The requirement of a case-by-case showing of dependence for illegitimate and step children was likewise eliminated, because, if such children were living with the deceased parent in a regular parent-child relationship, "the benefits should be paid

as for any other child" (*ibid.*).[27] Congress enacted the proposed changes without significant debate. The statute thus was, and remains, one of the class of statutes that provides "the wage earner and the dependent members of his family with protection against the hardship occasioned by his loss of earnings * * *." *Califano* v. *Jobst*, 434 U.S. 47, 52 (1977). It does this, as most similar statutes do, by directing benefits to the categories of persons that Congress thought are most likely to have lost support and need its replacement. The categorical lines are far from perfect; categorical lines always are. See *Califano* v. *Boles*, *supra*, slip op. 2-3, 7-12; *Califano* v. *Aznavorian*, No. 77-991 (Dec. 11, 1978), slip op. 5. But the imperfections here are not unconstitutional.

2. The lived-with requirement is a rational indicator of probable dependence

This Court held in *Mathews* v. *Lucas*, *supra*, 427 U.S. at 513-514, 516, that Congress, in dealing with illegitimates, constitutionally may "tailor[] statutory classifications in accord with its calculations of the likelihood of actual support suggested by a narrow set of objective and apparently reasonable indicators," even though the indicators may not be precisely ac-

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[27] The detailed explanation in the Cabinet Committee Report, *supra*, explains the cryptic comment in the Senate Report (S. Rep. No. 1187, 89th Cong., 2d Sess. 5 (1966)), on which the Court of Claims relied in *Gentry* (551 F.2d 854-855): "[T]he requirement that a child be dependent upon a Federal-employee parent in order to receive a survivor annuity [is eliminated to] * * * permit the children of a working mother to receive a survivor annuity in the event of her death."

curate. Accord, *Lalli* v. *Lalli*, *supra*, plurality slip op. 13-14. Moreover, the Court in *Lucas* evidently assumed that a showing that a wage-earner's illegitimate child lived with him was equivalent to a showing of that child's dependence on the wage-earner (427 U.S. at 498, 512-513). Although the Social Security Act under consideration in *Lucas* provided for other indicators of dependence,[28] the Court emphasized that "[t]o be sure, none of these statutory criteria compels the extension of a presumption of dependency. * * * [T]he constitutional question is not whether such a presumption is required, but whether it is permitted" (*id.* at 515). In the Civil Service Act Congress chose to rely on a single indicator of dependence—whether the illegitimate child lived with the wage earner. The two are sufficiently well related that the legislative choice is permissible.

The Court of Claims' contrary conclusion in *Gentry* apparently rested on its belief that *Lucas* turned on the fact that the Social Security provision at issue there permitted illegitimates to show dependence through a means other than living with the wage-earner. Where, as here, the method of qualifying for benefits is more restricted, the court thought, the method cannot be rationally related to the statutory purpose of replacing lost support. The court relied heavily on *Jimenez* v. *Weinberger*, 417 U.S. 628 (1974). It read that case as establishing that "barring a subclass of illegitimates from benefits, though

[28] Including a court order for child support—the indicator on which appellees chiefly rely.

some members may be dependents, conflicts with the overall aim of aiding dependents" (546 F.2d at 351-352). The Court of Claims thus read *Lucas* and *Jimenez* together as imposing a constitutional requirement that illegitimate children be given the opportunity to establish that they were in fact dependent on the deceased employee.[29]

This Court's subsequent decisions do not support *Gentry's* interpretation of those cases. In *Trimble* v. *Gordon*, *supra*, 430 U.S. at 770-771, the Court suggested that a statute might constitutionally distinguish between legitimate and illegitimate children by adopting "a middle ground between the extremes of complete exclusion and case-by-case determination" of the relevant characteristic (such as dependence). And in *Lalli* v. *Lalli*, *supra*, the Court upheld a statute that adopted such a middle ground (plurality slip op. 7). The Court explicitly recognized (*id.* at 12-13) that the use of categories necessarily will deny valued goods to some illegitimate children who,

[29] The statutory classifications involved in *Jimenez* defined the circumstances in which a disabled wage-earner's illegitimate children, born after the onset of his disability, were entitled to Social Security benefits. The Court concluded that those classifications could not constitutionally be used as indicators of dependence because they bore no rational relation to its likelihood. After-born illegitimates entitled to inherit under state law or legitimated by operation of state law were not more likely to have been dependent than after-born illegitimates who lived with the wage earner, but only the former could receive benefits. The assumption in the Civil Service Retirement Act that illegitimate children who lived with the wage-earner at the time of his death in normal parent-child relationships are the single group of illegitimate children *most* likely to have been dependent on him is not similarly irrational.

under a case-by-case approach, could establish their entitlement consistently with the broad statutory purposes. But such incidental inequitable results do not render a statute unconstitutional if the categories themselves are rational. *Califano* v. *Boles*, *supra*, slip op. 12-14; *New York Transit Authority* v. *Beazer*, No. 77-1427 (Mar. 21, 1979), slip op. 20-24; *Mathews* v. *DeCastro*, 429 U.S. 181, 189 (1976); *Califano* v. *Jobst*, *supra*, 434 U.S. at 53.[30]

3. *The statutory classification discourages spurious claims and facilitates efficient administration*

The role of the lived-with rule in establishing dependence is not the only source of support for the statute. This Court also has recognized that the difficulties of establishing the paternity of illegitimate children may justify statutory distinctions. See, *e.g.*, *Lalli* v. *Lalli*, *supra*, plurality slip op. 9; *Trimble* v. *Gordon*, *supra*, 430 U.S. at 770; *Weber* v. *Aetna Casualty & Surety Co.*, 406 U.S. 164, 174 (1972). The lived-with rule assists in overcoming these difficulties in the administration of the Civil Service Retirement Act.

[30] The fact that legitimate children who did not live with the decedent receive benefits, even though they may not have been dependent, does not make the statute irrational because, as a group, legitimate children (even those who do not live with the wage-earner) are more likely to have been dependent on him than the class of illegitimate children who did not live with the wage-earner. Although the effect of the statutory classification is to award payments to some legitimate children who were not in fact dependent on the decedent, this type of overinclusiveness is very similar to that found constitutional in *Mathews* v. *Lucas*, *supra*.

The Act permits payments only to recognized illegitimate children. Unfortunately, however, evidence relating to the decedent's "recognition" of an illegitimate child frequently may be ambiguous. It also easily could be fabricated.[31] Evidence that the child was living with the wage-earner at his death is less likely to be ambiguous and is harder to fabricate. The children who were living with the wage-earner at the time of his death, like his legitimate children, almost always will be readily identifiable. "Recognized" illegitimate children may be harder to identify. Thus here, as in *Lalli* v. *Lalli*, the legislative classification serves to minimize expense, inconvenience, delay and uncertainty in the identification of the beneficiaries (plurality slip op. 11-12).

The statutory scheme of the Civil Service Retirement Act makes the prompt and certain identification of eligible annuitants particularly important. The lump sum death benefit is payable only if there are no survivors entitled to an annuity (5 U.S.C. 8342). Payment must be delayed if it is necessary to resolve uncertainties about the entitlements of illegitimate children. More significantly, if there are more than three entitled children on one account, the size of each child's annuity depends on the number of other children entitled on the same account.[32] Thus, subse-

[31] The problem is not eliminated by the dependence requirement imposed by the Court of Claims, because it would also be difficult to controvert a claim that the decedent made some contributions to the claimant's support.

[32] See note 1, *supra*.

quent identification of eligible annuitants may require the recoupment of payments previously made (see 5 U.S.C. 8346(b))[33] and often will result in the prospective reduction of payments that previously identified survivors have come to rely on. Uncertainty in the identification of eligible children may also delay the start of payments or cause possibly-disputed sums to be withheld.

The problem is exacerbated by the fact that an eligible child may apply for his benefit as long as 30 years after he first becomes entitled to it, and he will still receive benefits from the date of first entitlement (5 U.S.C. 8345(h)(2)). It is obviously important to the effective administration of the Act to minimize belated claims. A claim filed 30 years after a government employee's death, alleging that the claimant is the recognized illegitimate child of the employee, received support from him, and thus is entitled to an accrued annuity, could pose real administrative problems. Such a tardy claim not only would be difficult to evaluate but also often would require double payments, because it is unlikely that recoupment of payments made long ago to previously-identified survivors would be equitable (see 5 U.S.C. 8346(b)).

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[33] For example, in this case Isaacson's father was paid a lump sum death benefit of $7,755.12, which he has been required to refund (note 10, *supra*).

C. This Court Should Respect The Legislative Accommodation Of The Competing Interests

As the Court of Claims recognized (*Gentry* v. *United States*, *supra*, 546 F.2d at 351), the legislative goal of aiding dependent children would be served by awarding benefits to all illegitimate children who were dependent in fact on the wage-earner. The court thus thought that its invalidation of the lived-with rule was more faithful to the statute's "purpose" than was the statute itself. But statutes do not conflict with their own "purposes," and a court is not free to revise a statute because it thinks it can devise a plan better attuned to assumed legislative goals. It is often true that Congress seeks to achieve more than one goal through particular language. Cf. *United States* v. *Naftalin*, No. 78-561 (May 21, 1979), slip op. 6. Any attempt to achieve more of one of the goals may mean the achievement of less of another; it will upset the legislative accommodation of interests. See *Califano* v. *Boles*, *supra*, slip op. 2-4, 14-15. And so it is here.

The provision of assistance to all identifiable dependent children of deceased civil servants is not the only, or even the primary, goal of the Civil Service Retirement Act. The statute is designed to provide a comprehensive basic retirement and survivor's insurance plan for civil servants, at a cost reasonable for both the employee and employer. In determining the scope of the children's annuity program, Congress considered its relation to the entire package of benefits. Judgments concerning the particular classes of children to be included, the size of annuities payable,

and the costs of administering the program are necessarily related; improvement in one area requires a compensating sacrifice in another (*Califano* v. *Boles*, *supra*, slip op. 3, 14-15). The program devised by Congress reflects both its decision concerning the proper relationship among these considerations and its decision "to concentrate limited funds where the need is likely to be greatest" (*id.* at 15). The judicial attribution of an overriding goal to Congress, and the expansion of the class of entitled annuitants "better" to serve that goal, necessarily requires a reallocation of resources and thus distorts the insurance package Congress selected, whether by diminishing the protection afforded other annuitants, by increasing the cost of the insurance, or by adding to the difficulties of administration.

The balancing of the competing social interests is a matter within the particular competence of the legislature.[34] Here, as in *Mathews* v. *Lucas*, *supra*, 427 U.S. at 515-516 (citations omitted):

> These matters of practical judgment and empirical calculation are for Congress. * * * Our role is simply to determine whether Congress' assumptions are so inconsistent or insubstantial as not to be reasonably supportive of its conclusions * * *. In the end, the precise accuracy of Congress' calculations is not a matter of specialized judicial competence; and we have no basis to question their detail beyond the evident consistency and substantiality. We cannot say that these expectations are unfounded, or so indiscriminate as to render the statute's classifications baseless.

[34] Indeed, Congress is considering the desirability of expanding the class of children entitled to Civil Service survivor's annuities to include people situated similarly to Shawn and Tricia Clark. OPM has recommended legislation that would eliminate the lived-with requirement. S. 509, 96th Cong., 1st Sess. (1979); H.R. 2584, 96th Cong., 1st Sess. (1979). That legislation has not yet been acted on by the responsible committees.

CONCLUSION

The judgment of the Court of Claims should be reversed.

Respectfully submitted.

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